SUPREME COURT OF THE UNITED STATES.

No. 466.—October Term, 1942.

Department of Banking, State of Nebraska, as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska, Petitioner, *vs.* Louis P. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company.	On Petition for Writ of Certiorari to the New York Supreme Court.

[December 21, 1942.]

Per curiam: This case is here on a petition for certiorari to the Supreme Court of New York. It appears from the record that a judgment of that court was affirmed by an order of the Appellate Division, which was on June 18, 1942 ordered affirmed by the Court of Appeals, whose remittitur to the Supreme Court was issued the same day. On June 25 the order and judgment of the Court of Appeals were made the order and judgment of the Supreme Court.

A motion was afterwards filed in the Court of Appeals to amend its remittitur by adding to it the statement that a federal question, on which the petition for certiorari relies, was presented and necessarily passed upon in that court. So far as appears, the motion did not seek a reargument or rehearing of any part of the case; it was no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case. On July 29 the Court of Appeals granted the motion and amended its remittitur accordingly. On September 16, the Supreme Court directed that the order amending the remittitur be made the order of the Supreme Court. The petition for certiorari was filed in this Court on October 20.

Under the three-months limitation imposed by the statute, 28 U. S. C. § 350, the petition for certiorari is timely only if the amendment of the remittitur extended the time within which to apply for certiorari. We are unable to conclude that it had such

effect. Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged; what was sought was merely the court's certification that a federal question had been presented to it for decision, and this could have no different effect on the finality of the judgment than a like amendment of the court's opinion.

A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. Here no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended. Accordingly we must deny the petition for certiorari on the ground that it was not filed within the time provided by law.

Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either. *Atherton* v. *Fowler,* 91 U. S. 143, 146. In reliance upon the early decision in *Green* v. *Van Buskerk,* 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under § 237 of the Judicial Code, 28 U. S. C. § 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in *Mower* v. *Fletcher,* 114 U. S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained

to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts* v. *Hoagland,* 105 U. S. 701, 702, and *Clark* v. *Williard,* 292 U. S. 112, 117-118. This rule applies with equal force to cases from New York, in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of § 237 of the Judicial Code, a final judgment reviewable here.

For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (*Wick* v. *Superior Court,* 278 U. S. 575; *Cheltenham & Abbington Sewerage Company* v. *Pennsylvania Public Utility Commission,* No. 160, decided October 12, 1942), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (see *Gorman* v. *Washington University,* 316 U. S. 98). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established.

It was for this reason that we recently held that the three-months requirement had not been complied with in *Monks* v. *Lee,* No. 244, and *Bunn* v. *City of Atlanta,* No. 364, in which cases judgments were brought here for review from the courts of California and Georgia, and in each of which a petition for rehearing is today denied. The petition for certiorari in this case must likewise be denied for want of jurisdiction.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

Office - Supreme Court, U. S.
FILED
OCT 20 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942

No. 466.

IN THE MATTER

of

NATIONAL SURETY COMPANY, in Liquidation.

DEPARTMENT OF BANKING, STATE OF NEBRASKA, as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska,

Petitioner,

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

WALTER R. JOHNSON,
Attorney General of the
State of Nebraska,
Counsel for Petitioner.

MORRIS AMCHAN,
HOWARD SAXTON,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1942

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LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

The petition of the Department of Banking, State of Nebraska respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

Your petitioner is the Department of Banking, State of Nebraska, an executive arm of the government of the State of Nebraska, acting as trustee and receiver for depositors of a failed Nebraska bank.

On June 1, 1934, the National Surety Company, a New York corporation, was placed in liquidation by the Su-

preme Court of the State of New York, and the liquidation order fixed April 1, 1935 as the last day for filing claims in the New York liquidation proceeding (fol. 921). On June 4, 1934, the Department of Banking, State of Nebraska, as claimant, duly filed its claim with the New York Liquidator for $30,693.96 (fol. 171). On June 13, 1934, the Liquidator returned the proof of claim so filed, with a statement, that as to the National Surety Company, it "is not acceptable at this time in view of the failure of the assured to present notice and Proof of loss within the time provided for in the bond. * * * One of the conditions of the bond is that any loss properly recoverable under same must be discovered within fifteen months after the termination of the bond. Since the claim was not presented prior to October 1, 1932, we cannot recognize any liability at this time in connection with the statement of claim which you have submitted" (fols. 174-175).

The claim filed disclosed that it was predicated on losses sustained by the Farmers State Bank of Callaway, Nebraska, arising out of dishonest and unlawful acts of its bonded officers (fols. 304-354). The bonds were executed in the State of Nebraska, and contained a provision that they "shall be construed according to and be governed by the Laws of the State of Nebraska" (fol. 227).

With this summary disposition of its claim by the New York Liquidator, claimant instituted suit in the State of Nebraska on August 20, 1934, on the very losses that were theretofore filed and so summarily rejected by the Liquidator. The Nebraska action named as defendants the principals on the bonds, the National Surety Company and the reorganized National Surety Corporation (fols. 193-373).

Process was served on the National Surety Company, by serving its statutory agent, the Director of Insurance of the State of Nebraska (fol. 368). His authority as agent for the Surety Company is derived from a power

of attorney filed by the insurer with the Insurance Department of the State pursuant to Nebraska statutes, whereby the Insurance Commissioner was appointed statutory agent to receive process on its behalf (fols. 186-191). And the instrument filed, in conformity with the statute, provided "that this authority shall continue so long as any liability remains outstanding against the Company in this State" (fols. 724-726). The Nebraska Commissioner of Insurance forwarded process to the New York Liquidator, who acknowledged receipt of the summons and complaint, but elected to ignore it and defaulted in appearance (fol. 374).

The principals on the bonds and the reorganized National Surety Corporation, did however, appear by counsel, and the trial then proceeded in Nebraska where judgment was rendered against the principals on the bonds for the full amount, and against the National Surety Company, by default for $34,854.44 (fols. 379-420).

While this Nebraska action was pending, the claimant had garnisheed moneys of the National Surety Company which were on deposit with Nebraska banks in order to satisfy a judgment that claimant had against the surety company. On January 15, 1935, the New York Liquidator of the National Surety Company made application to the Nebraska Courts to vacate the garnishee, and asked that the moneys and assets be remitted to the Liquidator in New York for use of all creditors. The Nebraska Courts granted the Liquidator's application, vacated the garnishee and remitted the moneys and assets to New York (fol. 69).

Thereafter, in the Nebraska action, a referee was appointed and after extensive hearings, where some five volumes of testimony was taken (fols. 165, 168, 459-464), reported to the Court in detail on the cause then pending (fols. 421-678).

On this report the District Court of Nebraska rendered judgment against the principals on the bonds and the National Surety Company for $34,854.44 (fols. 127-140).

Claimant asked the Liquidator in New York to give to this judgment full faith and credit. The Liquidator declined to do so, and recommended the claim for disallowance (fols. 681-3). The New York Courts sustained the Liquidator and the Court of Appeals of that State, in its order of remittitur, recites that:

> "A question under the Federal Constitution was presented and necessarily passed upon in this proceeding by this Court, namely:
>
> Whether the judgment secured by the Department of Banking, State of Nebraska, was entitled to be accorded full faith and credit by the Courts of the State of New York pursuant to Article 4 of the Constitution of the United States. This Court held that the judgment was not required to be given full faith and credit pursuant to the Constitution of the United States."

B

Reasons Relied On for the Allowance of the Writ

Your petitioner respectfully submits that there is here presented an important question of law relating to the liquidation of an interstate insurer; the problem of the right of a non-resident creditor, who had previously filed his claim with the domiciliary liquidator, to invoke his local forum for the proof of such claim.

1. The Court of Appeals of the State of New York, in denying full faith and credit to the Nebraska judgment herein, has decided a Federal question of substance which is not in accord with applicable decisions of this Court, particularly,

Washington ex rel. Bond & G. & T. Co. v. *Superior Ct.*, 289 U. S. 361;
Clark v. *Williard*, 292 U. S. 112;
Fischer v. *American United Ins. Co.*, 314 U. S. 549.

2. The question is one of public importance which should be passed upon by this Court. The State of Nebraska feels that it has jurisdiction to pass on the merits of claims of its citizens against an insolvent interstate insurer which had been doing business in Nebraska pursuant to permission. The domiciliary liquidator was apprised of the claims by virtue of a filing of claim in his jurisdiction, and further, Nebraska remitted all local assets of the insurer to the domiciliary liquidator. Under such circumstances Nebraska feels that its citizens are not required to go to New York in order to have the merits of their claims passed upon, but may invoke their local forums for such purpose, since a determination of the merits of a claim did not involve a disturbance of the possession or control of the New York courts over the insurer's property.

The public importance of this question is again attested by the fact that the TNEC, in its Final Report and Recommendation (S. Doc. No. 35, 77th Cong. 1st Sess. [1941], pp. 559-602) calls attention to this problem and suggests the need of a solution by having the Federal Government take jurisdiction if the states cannot grant relief against the rigors of a rule that requires non resident creditors to seek the state of domicile of a foreign insurer in order to prove their claims against an insolvent interstate insurer.

Such questions of competing claims on the part of sister states respecting jurisdiction involving claims against an insolvent interstate insurer, are appropriate questions to be presented to this Court for determination.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, County of New York, commanding that Court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the records and proceedings herein, and that the said judgment of the Supreme Court of the State of New York, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

DEPARTMENT OF BANKING, STATE OF NEBRASKA, petitioner,

By

WALTER R. JOHNSON,
Attorney General of the
State of Nebraska,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below.

No opinion was rendered by the Court of Appeals or the Appellate Division. Special Term of the Supreme Court rendered a short memorandum opinion (R. 353), and the referee who passed on the cause in the first instance, rendered an opinion holding the judgment herein void (R. 314-325) which opinion is not otherwise reported.

II

Jurisdiction.

The judgment and amended remittitur of the Court of Appeals is dated, July 29, 1942 (R. 363, *et seq.*). It contains a recital that a question under the Federal Constitution was presented and passed upon by the Court in arriving at its decision.

Jurisdiction of this Court to entertain the petition is predicated upon Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

III

Statement of the Case.

This has already been set forth in the preceding petition under A (pp. 1-4).

IV

Questions Presented.

1. Whether the judgment secured by the Department of Banking, State of Nebraska, in the Courts of Nebraska, is entitled to be accorded full faith and credit by the New York Courts under the Federal Constitution.

V

Specifications of error.

The Court below erred in holding:

1. That the courts of the State of Nebraska had no jurisdiction over the National Surety Company.

2. That the requirement of Nebraska statutes as respects a foreign insurance company, that it submit to Nebraska jurisdiction as to liabilities there contracted notwithstanding the dissolution of the insurer in its chartering state, was entitled to no extraterritorial effect and furnished no basis for jurisdiction over the insurer after its dissolution.

VI

Summary of Argument.

Nebraska need not have admitted the National Surety Company to do business within its borders. It conditioned its admission to do business in the State by requiring it to submit to its jurisdiction so long as there were outstanding liabilities against it in the state. This we say, was a reasonable condition that Nebraska could exact from this foreign insurer for the protection of its citizens who did business with the company. New York, the chartering state of the insurer, asserts that Nebraska can only require the company to submit to its jurisdiction while it is a going

concern, and that its attempt by statute to continue to retain jurisdiction as to liabilities there contracted, after the dissolution of the company in the chartering state, is invalid. Our point is that the chartering state may not so limit Nebraska as respects subjecting a foreign insurer to its jurisdiction.

POINT I

The Nebraska statutes and the power of attorney filed by the Surety Company thereunder, furnished a sufficient basis upon which jurisdiction over the company could be predicated.

In August, 1913, the National Surety Company applied to the State of Nebraska for permission to transact the business of insurance in that state. Permission was granted pursuant to its statutes upon its filing a Power of Attorney with the Insurance Department of that State (Cl.'s Exh. 16, p. 242) whereby the Insurance Commissioner was appointed its statutory agent to receive process on its behalf. The Surety Company, by this instrument, further agreed, "that this authority shall continue in force so long as any liability remains outstanding against the Company in this State" (Cl.'s Exh. 16).

The requirement that a foreign insurer appoint an agent to receive process on its behalf, conforms to the prevailing practice throughout the country, whereby local citizens can enforce their claims on insurance policies in the local courts and not be compelled to seek the courts of the chartering state of such foreign insurer for the enforcement of such claims.

Mutual Reserve Life Assn. v. *Phelps,* 190 U. S. 147;
St. Clair v. *Cox,* 106 U. S. 350;
Wash. ex rel. Bond & G. T. Co. v. *Superior Ct.,* 289 U. S. 361.

Specifically, Nebraska intended to protect its citizens in the event of any claims arising on policies written by the National Surety Company in that State. It wanted the assurance that on such claims its citizens could sue the insurer in Nebraska and not be compelled to follow the company to New York. And so its Constitution and Statutory law were framed to effect that purpose (Cl.'s Exhs. 3, 4, 5, 17).

That the State of Nebraska had power to impose such conditions upon a foreign insurer as a requisite to doing business in that state admits of no doubt.

> *Mutual Reserve Life Assn.* v. *Phelps*, 190 U. S. 147, *supra;*
> *Comey* v. *United Surety Co.*, 217 N. Y. 268, 272-74.

That a foreign insurer cannot defeat this purpose by simply withdrawing from the State and ceasing to do business therein is likewise firmly established. And dissolution of a foreign insurer at its home state is equivalent to a withdrawal from the state.

> *Wash. ex rel. Bond & G. T.* v. *Superior Ct.*, 289 U. S. 361, *supra.*

The Courts below have taken the position that the common law rule as to the dissolution of a corporation prevails; that upon such dissolution of the corporation by the chartering state, the corporation ceases to exist for all purposes and hence Nebraska had and has no power in any way to modify the common law rule.

This view is set forth in the opinion of the referee below (R. 323) quoting from an opinion of the Court of Appeals in another case (*Matter of National Surety Co.*, 283 N. Y. 68), as follows:

> "When permission was granted to the National Surety Company by the State of Mississippi to do business in that State this did not change the fact that the State authorities were chargeable with knowledge of the statutes of the State of New York under which the National Surety Company was incorporated. This included knowledge that the State of its creation had the power to order its destruction and death. The statutes of a foreign jurisdiction can in no way modify, change or nullify the effectiveness of the dissolution of a corporation in the State of its incorporation * * *. Thus judgments entered against the dissolved corporation in a foreign jurisdiction are null and void in the state of its incorporation, and valid, if at all, only as to local assets found in the foreign jurisdiction."

This view of the law, we respectfully submit is erroneous. It denies the power of a state to impose any conditions respecting continuance of statutory agencies for service of process, since the argument suggests that the law of the chartering state controls everywhere the corporation may seek to do business.

The Nebraska Constitution (R. 60) provided:

> "Foreign corporations transacting or seeking to transact business in this state shall be subject, under general law, to regulation, supervision and general control, and shall not be given greater rights or privileges than are given domestic corporations of a similar character."

The National Surety Company, at the time it applied to Nebraska for permission to transact business is charged with knowledge of this provision and of the statutes enacted thereunder requiring it to file a power of attorney with the State Director of Insurance, and consequently must be deemed to have submitted to the jurisdiction of Nebraska.

If the view of the Court below is correct, then a resident of Nebraska who does business with a foreign in-

surer, may not rely on the prevailing law of Nebraska with respect to the regulation of such insurer, but would be charged with knowledge of the law of forty-seven different chartering states.

The opinion below suggests that the judgment herein, if valid at all, would be valid only as to the local assets of the company found in Nebraska. As applied to the situation at bar, this creates an anomalous situation.

First, the New York Liquidator, applied to the Nebraska Courts (after the commencement of the suit herein) to vacate a garnishee that a local creditor had levied on local assets of the company, and asserted that under the doctrine of *Clark* v. *Williard*, 292 U. S. 112, he was entitled to possession as well as legal title to all of the assets of the company wherever situated. Nebraska having committed herself to a public policy favoring a centralized liquidation of an interstate insurer, remitted the local assets of the company to the Domiciliary Liquidator in New York (R. 23).

> *State, ex rel. Sorensen* v. *State Bank of Omaha*, 136 Neb. 880.

It obviously must have relied on the fact that it retained jurisdiction to pass on the merits of claims of its citizens, since it plainly relinquished all control over the property of the insurer, and hence no interference with the control or possession of the New York Liquidator can be involved.

The contention of the domiciliary liquidator that New York is the exclusive jurisdiction for the determination of the validity of claims against an insolvent interstate insurer cannot be sustained under the authority of

> *Fischer* v. *American United Ins. Co.*, 314 U. S. 549.

This is not a case where the domiciliary liquidator did not receive full notice and an opportunity to defend (cf. *Uniform Insurers Liquidation Statute*). Here the respondent, relying on a decision of a United States District Court (R. 125) chose to ignore the summons and complaint served upon him by the Nebraska Director of Insurance. And yet, while the action was pending in Nebraska, respondent appeared in Nebraska for the purpose of asking its courts to subordinate and remit the local assets of the company to his jurisdiction.

The respondent seems to treat, *Matter of National Surety Co.* (*Laughlin*), 283 N. Y. 68, cert. denied, 311 U. S. 707, as a decision of this Court, and suggests that it is authority *contra* to petitioner's view. A denial of a petition for a writ of certiorari is not, as this Court has on many occasions stated, equivalent to an affirmance of the decision sought to be reviewed, and the *Laughlin* case cannot be treated as authority of this Court.

> *Hamilton Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258;
> *Atlantic Coast Lines R. R. Co.* v. *Powe*, 283 U. S. 401.

Moreover, in the *Laughlin* case, Mississippi refused to subordinate or transmit local assets of the insurer to the domiciliary liquidator, but retained it for the benefit of local creditors, and thus there was in some degree an interference with the possession and control of the domiciliary liquidator.

If we may look to the line of cases relating to the jurisdiction of a state to impose a tax on the transfer of shares of stock in a corporation which is incorporated

under its laws, and where the decedent is not domiciled in that State (Cf. *State Tax Commission* v. *Aldrich,* 316 U. S. 174), then it should follow that Nebraska has at least as substantial a basis upon which it may sustain jurisdiction over the National Surety Company with respect to business there transacted.

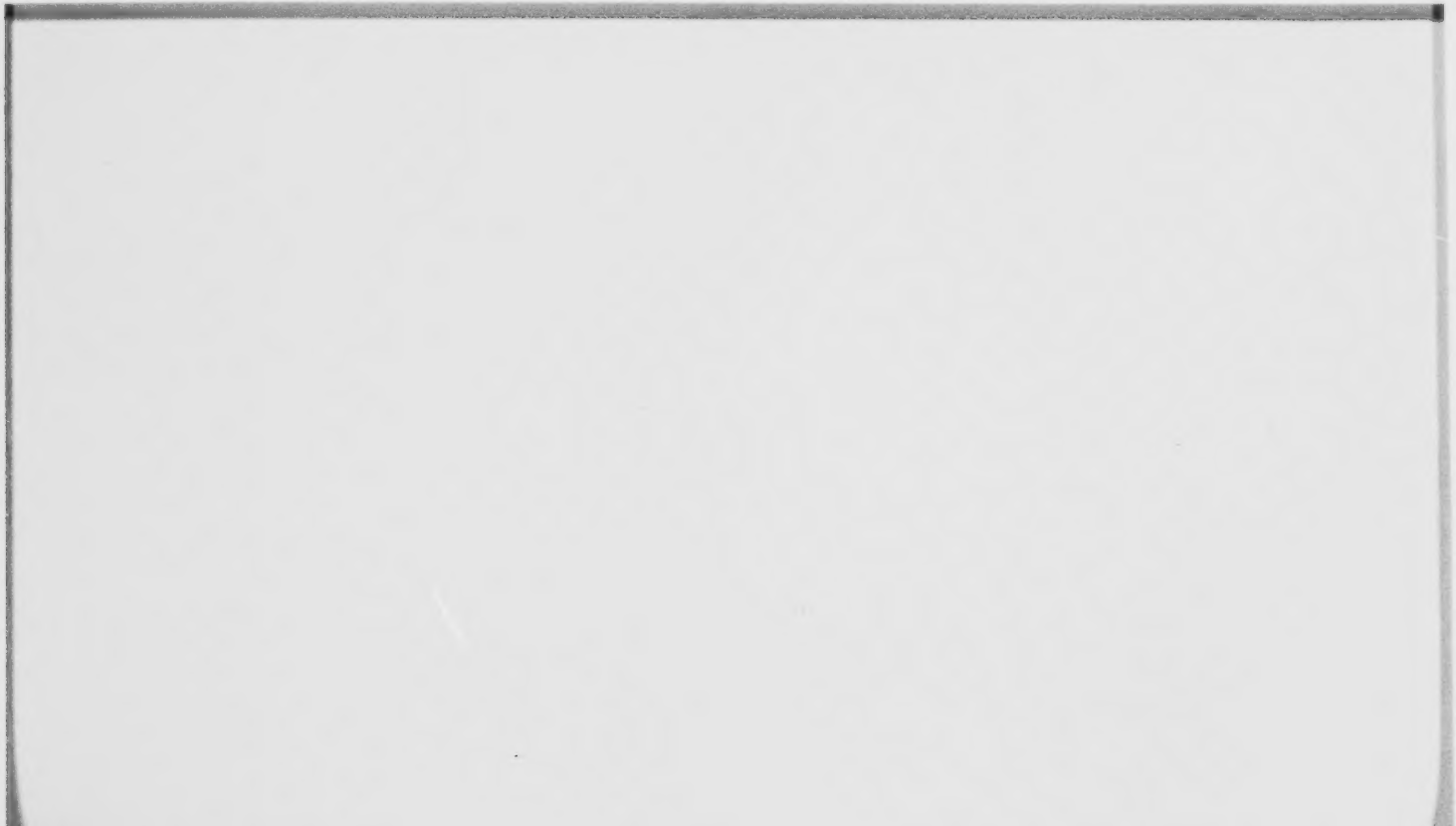
Conclusion

This case, involves we think, competing claims of sister states as to the exercise of jurisdiction over an insurer which did a nation-wide business, and it is, we respectfully submit, an appropriate case for review and consideration by this Court.

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of the
State of Nebraska.

MORRIS AMCHAN,
HOWARD SAXTON,
of Counsel.



SUPREME COURT OF THE [illegible]

October Term, 1927.

No. [illegible]

In the Matter
of
NATIONAL SURETY COMPANY, in Liquidation

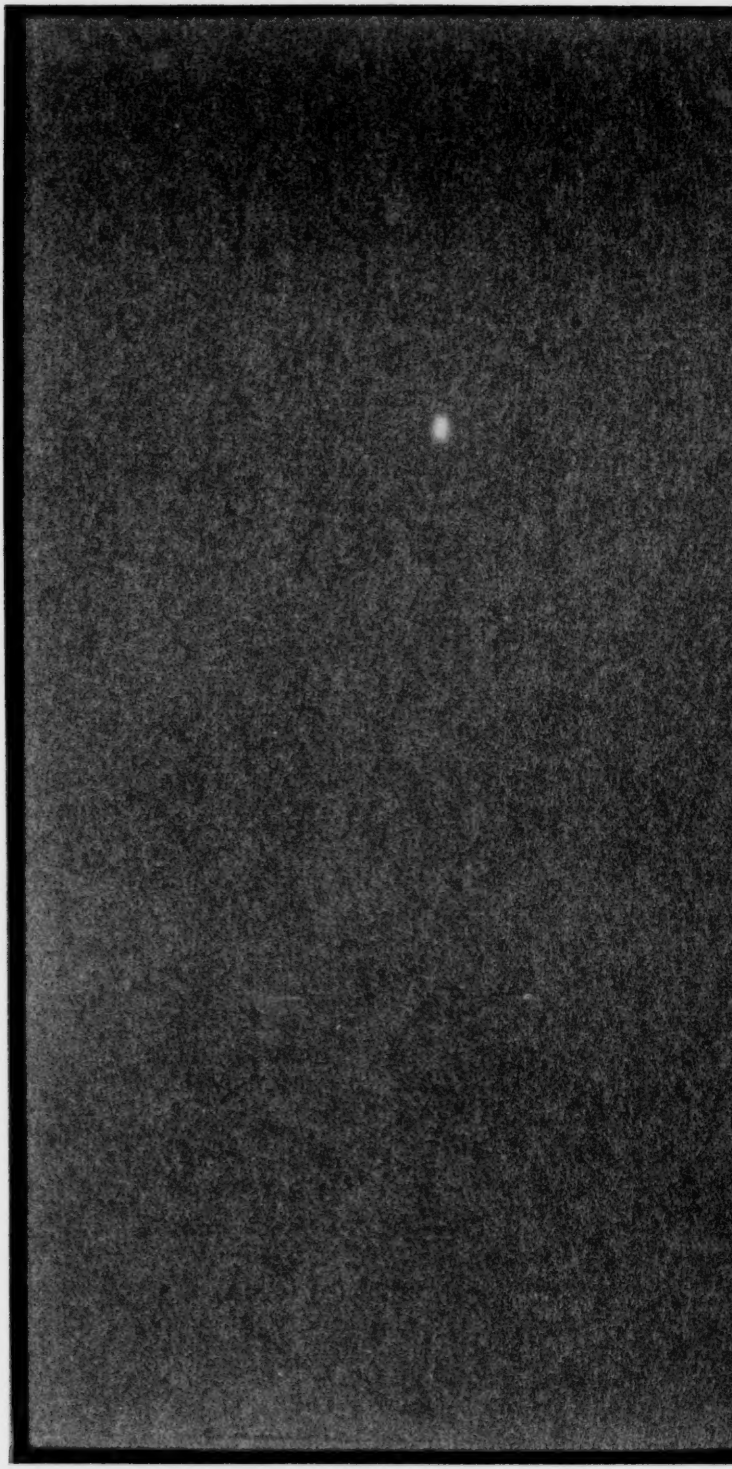
DEPARTMENT OF BANKING, STATE OF [illegible]
KA, as Receiver and Liquidator [illegible]
State Bank, Callaway, Nebraska,

against

LOUIS H. PINK, Superintendent [illegible]
State of New York, as Liquidator of the National
Surety Company,

MOTION FOR LEAVE TO FILE [illegible]
IN SUPPORT OF [illegible]

ATTORNEYS [illegible]
Of The [illegible]
Florida, [illegible]
Dakota, Calif[illegible]



SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 466

IN THE MATTER

of

NATIONAL SURETY COMPANY, in Liquidation

DEPARTMENT OF BANKING, STATE OF NEBRASKA, as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska,

Petitioner,

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company,

Respondent.

The undersigned representing the sovereign States of Colorado, Connecticut, Florida, Georgia, Indiana, Kentucky, Missouri, North Dakota, Ohio, Texas, Utah and Wyoming, respectfully ask leave of this Honorable Court to file the annexed brief as *amici curiae*, in support of the petition of the Department of Banking, State of Nebraska, for a writ of certiorari.

BRIEF OF AMICI CURIAE.

Introduction.

The States of Colorado, Connecticut, Florida, Georgia, Indiana, Kenucky, Missouri, North Dakota, Ohio, Texas, Utah and Wyoming, sovereign states of the United States of America, join in filing this brief as *amici curiae* in support of the petition for a writ of certiorari, and the contention of the Department of Banking, State of Nebraska, that a non resident creditor is not required to go to the domiciliary state of an insolvent interstate insurer in order to prove the merits of his claim, but may invoke his local jurisdiction to secure such an adjudication in cases where the local state has a public policy of subordinating and transmitting local assets of the insurer to the domiciliary liquidator.

Interest of the Amici Curiae.

The states which have joined in filing this brief as amici curiae, have no interest in the outcome of this cause insofar as the facts or merits of the particular case are concerned. The named states believe, that the rule which seems to have been adopted below, is erroneous, because it unreasonably restricts the powers of a state to regulate a foreign insurance corporation by denying it the right to compel such insurer, in the event of insolvency, to answer in its domestic courts for breach of contract made in the state with its residents. The rule adopted below, would, as we understand it, require the non resident creditor in *all* cases, to come to the chartering state of such insurer in order to secure a determination of the merits of his claim, which to us, seems to place a rather heavy burden on the citizens of our re-

spective states, a burden which they did not assume when they did business in their own states with the foreign insurer.

Statement of the Case.

The authors of the brief adopt the statement of the case as set forth in the petition and brief of the Department of Banking, State of Nebraska.

The Issues Involved.

The question presented is whether a state which has admitted a foreign insurance corporation to do business within its borders, conditioned upon the requirement that it submit to the jurisdiction of that state so long as there are outstanding liabilities against the insurer in the state, may, in the case of insolvency of such insurer, entertain jurisdiction in a suit brought by a resident claimant against the insurer. The question is limited to the case of a state which has a public policy of subordinating and transmitting the assets of the insolvent insurer to the domiciliary receivership.

Argument and Citation of Authority.

We have always supposed that a state had power to exclude a foreign corporation from doing business unless it consented to submit to reasonable conditions which were deemed necessary for the protection of its citizens. In an endeavor to secure to its citizens a remedy in its own jurisdiction with respect to claims arising out of business transacted in the state, the condition has been imposed that a foreign corporation submit to its jurisdiction in order that its residents be not compelled to follow it to its home state for redress of their griev-

ances. Jurisdiction over such corporations is predicated on consent so given, or consent failing, on their presence in the state by virtue of having transacted business there.

Lafayette Ins. Co. v. *French*, 18 How. (U. S.) 404, 407.

St. Clair v. *Cox*, 106 U. S. 350, 355.

Conn. Mutual Life Ins. Co. v. *Spratley*, 172 U. S. 602, 619.

Nierbo Co. v. *Bethlehem Ship. Corp.*, 308 U. S. 165.

Experience has demonstrated that it was necessary, in order to furnish adequate protection to its citizens, to provide by legislation and regulation, that such submission to the local jurisdiction shall continue notwithstanding the withdrawal of the foreign corporation from the state, so long as there were outstanding liabilities against the corporation in the state. A state having thus acquired jurisdiction over a foreign corporation may not be ousted of such jurisdiction by the withdrawal of the corporation from the state, be that withdrawal voluntary or involuntary.

Mutual Reserve Life Assn. v. *Phelps*, 190 U. S. 147.

Washington ex rel Bond & G. & T. v. *Superior Court*, 289 U. S. 361.

As a matter of historical fact, it was the expansion of the insurance business, the writing of policies of insurance by large corporations, chartered in the Eastern states, that prompted the enactment of the protective measures referred to.

The rule suggested by the Courts below, seems to us to hold, that in the event of insolvency of a foreign in-

surer and the commencement of liquidation proceedings in the state of its domicil, all non resident creditors *must* come to the home state of such insurer in order to prove their claims and be permitted to share in the distribution of assets. This rule is to be applied we understand, although a sister state has declined to permit its residents to secure preferential treatment through the process of attaching local assets, and has turned over all property of the insolvent insurer to be distributed by the domiciliary receivership.

It is difficult for us to perceive why, under such circumstances, a non resident creditor should be put to the trouble and expense of coming to New York to secure an adjudication of the merits of his claim. The insurer answered in the courts of the respective states while it was a going concern, and we see no basis for the suggestion that our courts will depart from established principles of law and justice to favor the claims of its own citizens in the receivership of an insurer which did a national business. The fear of local favoritism is not only groundless, but is negatived by the application of a policy by a state of transferring and surrendering all assets and property of the insurer to the home liquidator.

Clark v. *Williard*, 292 U. S. 112; 294 U. S. 211. Annotations, 98 A. L. R. 351.
Fischer v. *American United Ins. Co.*, 314 U. S. 549.

If the rule declared below is now adhered to, it will be necessary for the respective states to enact new measures to secure for its citizens the necessary protection so that upon insolvency of an interstate insurer, they

will not be required to come to the home state of such insurer for satisfaction of their claims. The only measures that we can now see which will be adequate to furnish such protection, is to require each foreign insurer to deposit liquid securities in an amount sufficient to answer for liabilities accrued under business transacted in our respective states.

This we feel would involve a profound and substantial change in our dealings with foreign insurers. Liquid assets would be taken out of productive use and the type of security would vary with the investment requirements of each state resulting in additional supervision and regulation. Insolvency will tend to promote competition between the states rather than cooperation. Such a policy would be harmful to business and unnecessarily retard and impede growth of corporate enterprise. We would be reluctant to adopt such a policy of regulation and supervision, and we feel it is not necessary to do so. Especially so since this would not deprive the federal courts of entertaining jurisdiction (cf. *Fischer v. American United Ins. Co.*, supra). Yet if a judgment secured under circumstances as here set forth is not recognized in the home state of a foreign insurer, the states are given no alternative but to adopt such a policy since nothing less will protect its citizens against the requirement that they come to the chartering state of an insolvent insurer in order to prove their claims.

In addition to what is said herein the States filing this brief amici curiae, adopt the argument and citations contained in the petition and brief filed by the petitioner, and add their request that the petition for a writ of cer-

tiorari be granted. and the judgment of the Court below be reversed and the foreign judgment sustained.

Respectfully submitted,

GAIL L. IRELAND,
Attorney General of Colorado,
FRANCIS A. PALLOTTI,
Attorney General of Connecticut,
J. TOM WATSON,
Attorney General of Florida,
ELLIS ARNALL,
Attorney General of Georgia,
GEORGE N. BEAMER,
Attorney General of Indiana,
HUBERT MEREDITH,
Attorney General of Kentucky,
ROY MCKITTRICK,
Attorney General of Missouri,
ALVIN C. STRUTZ,
Attorney General of North Dakota,
THOMAS J. HERBERT,
Attorney General of Ohio,
GERALD C. MANN,
Attorney General of Texas,
GROVER A. GILES,
Attorney General of Utah,
EWING T. KERR,
Attorney General of Wyoming.

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Supreme Court of the United States

October Term, 1942

No. 466

In the Matter

of

NATIONAL SURETY COMPANY, in Liquidation.

DEPARTMENT OF BANKING, STATE OF NEBRASKA, as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska,

Petitioner,

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

EDWARD F. KEENAN,
Attorney for Respondent,
No. 160 Broadway,
New York, N. Y.

J. FRANCIS LYNCH,
Of Counsel.

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Supreme Court of the United States

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National Surety Company, in Liquidation.

Department of Banking, State of Nebraska, as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska,

Petitioner,

against

Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

BRIEF FOR THE RESPONDENT IN OPPOSITION

The Opinions Below

The Court of Appeals and the Appellate Division of the Supreme Court, First Judicial Department, unanimously affirmed the order of Special Term without opinion. Special Term of the Supreme Court, New York County, by memorandum decision (fols. 1057-1059) confirmed the

report of the referee (940-1053) who had recommended the disallowance of the claim under the Nebraska judgment and the allowance of the claim for the sum of $3,339.22 under common law proof.

Question Presented

Whether a judgment, entered in the State of Nebraska, in an action instituted by service of process in said State upon the former statutory agent, against National Surety Company after its dissolution in the State of New York, is binding on the Superintendent of Insurance of the State of New York, as Liquidator of National Surety Company, and is entitled to full faith and credit in New York?

Under identical facts, such a judgment was held to be null and void and not entitled to full faith and credit in New York. *Matter of National Surety Company* (*Laughlin*), 283 N. Y. 68, certiorari denied *sub. nom. Laughlin* v. *Pink*, 311 U. S. 707.

Statement

On August 14, 1930, National Surety Company wrote five fidelity bonds covering five officers of the Farmers State Bank of Callaway, Nebraska. On December 28, 1933, the Bank was closed and Petitioner took possession of its assets for liquidation (843).

On June 1, 1934, by order of the Supreme Court of the State of New York, New York County (901-927), the Superintendent of Insurance of the State of New York took possession of the assets of National Surety Company for liquidation. Title to all the assets were vested in the Superintendent to deal with them in his own name, the corporate charter of the Company was revoked, and all persons had until April 1, 1935, to file claims.

On June 2, 1934 (928-939), Petitioner sent the former National Surety Company an alleged proof of loss under the bonds in the form of "STATEMENT OF CLAIM AGAINST NATIONAL SURETY COMPANY. STATEMENT OF CLAIM AGAINST NATIONAL SURETY CORPORATION," sworn to the 22nd day of May, 1934 (304-361). On June 13, 1934 (172-179) the Liquidator returned the notice of loss, prepared and sworn to before the date of liquidation, as not complying with the terms of the bonds, and enclosed a copy of the liquidation order giving Petitioner notice of the dissolution of the Company and of the requirement to file claims on or before April 1, 1935.

Petitioner disregarded this notice and the provisions of said order and on August 25, 1934, instituted suit in Nebraska against the dissolved National Surety Company by service of process on the former statutory agent (364-370). On September 13, 1934, the Liquidator, again notified Petitioner of the necessity to file claim and that all actions against the Company had abated due to its dissolution (373-379).

On July 1, 1938, Petitioner entered judgment by default against National Surety Company in Nebraska in the sum of $29,854.44 (379-421).

On December 6, 1938, the Liquidator, after considering the claim timely filed, recommended the claim for disallowance (679-684) to which Petitioner filed objections (685-712). The issues thus raised were referred. Hearings were intermittently held from January 12, 1940 to June 5, 1941 (22-171). The referee recommended the allowance of the claim under common law proof for the sum of $3,339.22 and the disallowance of the claim under the Nebraska judgment (940-1053).

Petitioner, as statutory receiver and liquidating agent in Nebraska of insolvent state banks, represents the creditors of the insolvent Farmers State Bank of Callaway, Nebraska. Respondent, as statutory liquidator in

New York of insolvent insurance companies, represents the creditors of the insolvent National Surety Company.

On this application the Attorney-General of Nebraska appears for Petitioner for the first time in the prosecution of this claim.

Summary of Argument

Upon the issuance of a license to National Surety Company to do business, the State of Nebraska accepted, recognized and was charged with notice of the charter of National Surety Company and with the Laws of New York under which the Company was incorporated and dissolved. When dissolution occurred on June 1, 1934, the corporate existence of the Company terminated. All actions then pending or thereafter instituted, abated; the authority of the statutory agent to accept process, was revoked; and all judgments, entered in said actions, were null and void against the assets of the Company in New York and were not entitled to full faith and credit in New York.

POINT I

The judgment entered in Nebraska is null and void as to assets held by the Liquidator of National Surety Company in New York and is not entitled to full faith and credit under Article IV, Section 1 of the Constitution of the United States.

The corporate existence of National Surety Company was terminated on June 1, 1934, by the order of liquidation; Petitioner instituted suit against the Company after dissolution by service of process in Nebraska on the former statutory agent of the Company; and judgment was en-

tered on default against the dissolved Company on July 1, 1938.

In the Matter of National Surety Company (*Laughlin*), 283 N. Y. 68; certiorari denied 311 U. S. 707, the above identical facts were the basis of the decision.

The Court of Appeals, in the latter case by unanimous opinion, laid down certain rules of law and reaffirmed others, holding: that all persons who had contracted or done business with the dissolved corporation were charged with knowledge of and were bound by the statutes governing the termination of its corporate existence upon dissolution, and its liquidation; that the New York Insurance Law governed the dissolution of National Surety Company and provided for the immediate cessation of its corporate life; that the common law rule, that upon the dissolution of a corporation all actions pending or thereafter instituted, abate and judgments thereafter entered are null and void, is applicable to the dissolution of National Surety Company; that such judgments entered against the dissolved corporation in a foreign jurisdiction are null and void in the State of incorporation; that the Mississippi judgment had no extraterritorial effect, was null and void in New York and was not entitled to full faith and credit; that the authority of the statutory agent of Mississippi was revoked and ceased to exist upon the dissolution of National.

Realizing that the above principles were applicable to the case at bar, Petitioner appeared *amicus curiae* in the *Laughlin* case in the Court of Appeals and again in this Court on the application for a writ of certiorari which was denied (*Laughlin* v. *Pink*, 311 U. S. 707).

An attempt has been made to distinguish between the case at bar and the *Laughlin* case; first because of an alleged rejection of the claim and second, because the State of Nebraska returned all assets of National Surety Company to the State of New York for liquidation and thereby impliedly gave Petitioner the right to sue in any court in Nebraska of its own choice.

The evidence does not sustain the alleged rejection of claim (928-939; 172-179; 373-379) but shows that the Liquidator notified Petitioner of the dissolution of the Company and of the necessity to file claim. Both were disregarded.

The return of the assets by Nebraska to New York was in accordance with the established law of the State of Nebraska.

> *Kinsler* v. *Casualty Co. of America*, 103 Neb. 382; 172 N. W. 33 (1919);
> ***State ex rel. Sorensen, Atty. Gen.*** v. *State Bank of Omaha*, 136 Neb. 880; 287 N. W. 762 (1939).

Under these decisions, contrary to the contention of Petitioner, the State of Nebraska, when it issued a license to National Surety Company, not only was charged with notice of its charter and the statutes of New York governing the incorporation, continuance and dissolution of the Company, but also, if the Company was declared insolvent, that the Superintendent of Insurance would succeed to the title of all its assets, wherever located, for the benefit of all creditors, whether residents of New York or of foreign states.

This Court, in the case of *Fischer* v. *American United Life Ins. Co.*, 62 Sup. Ct. 380, recently had occasion to comment on the significance and import of the prevailing law of the State of Iowa regarding the retention of the assets of a dissolved corporation for the benefit of creditors in Iowa, by a receiver appointed in Iowa. This Court, speaking through Mr. Justice DOUGLAS, held at page 382:

> "Even though the latter were true, claimants entitled to the benefits of the fund in Iowa might pursue their suits and remedies against it in derogation of the claim of the Michigan receiver, if that were Iowa's policy. *Clark* v. *Williard*, 294 U. S. 211, 55 Sup. Ct. 356, 79 L. Ed. 865, 98 A. L. R. 347. That is the asserted Iowa policy here."

The asserted policy of Nebraska was to recognize the title of the Liquidator in New York to all assets of National Surety Company and to send all assets to New York where claimants, including Nebraskians, could file and prove their claims. Rather than abide by this asserted policy, Petitioner brought action against the dissolved Company and then, without success, attempted to overrule, in the *Sorensen* case, *supra*, the established law of Nebraska as expressed in the *Kinsler* case, *supra*.

Petitioner, mindful of the Nebraska law, implies and assumes that the Nebraska Courts, retained the right to pass on the merits of Nebraska claims. The implication and assumption are wholly without basis. Nebraska never had *in personam* jurisdiction over the Liquidator. It relinquished *in rem* jurisdiction in favor of the Liquidator. Yet, Petitioner contends that the absence of the former and the yielding of the latter is equivalent to both being retained.

Petitioner, in support of the merits of its claim before the referee, first offered proof in the form of the Nebraska judgment and then proof of the alleged losses under the bonds. Hearings were conducted over a period of a year and five months. Although Petitioner had every opportunity to prove its claim, it was held by all the New York Courts, by unanimity of opinion, that the Nebraska judgment was null and void and that common law proof sustained a claim in the amount of $3,339.22.

National Surety Company did business in all of the States of the Union and in the District of Columbia. In thirty-eight States and in the District of Columbia, receivership proceedings were instituted.

The Attorney Generals of thirteen States appear herein as *amici curiae* as they did before the Court of Appeals in New York. In four of these States, Colorado, Montana, North Dakota and Wyoming, no receivers were appointed. Of the nine States where receivers were appointed, the receivers in the four States of Connecticut, Indiana,

Montana and Utah sent the claims filed with them to New York for determination. In the four States of Florida, Georgia, Texas and Ohio, the receivers decided the validity of the claims filed there. In Kentucky, although a receiver was appointed, no claims were filed.

The said Attorney Generals have erroneously concluded that the decision of the Court of Appeals herein has established the domiciliary jurisdiction in New York as the only jurisdiction wherein claims could be filed and determined. The receivership proceedings of National Surety Company in thirty-nine ancillary jurisdictions, including nine of said thirteen States, belie this conclusion. Actually, the Attorney Generals, through a misconception of the true facts, disagree with the nullification of the Nebraska judgment as the basis for a claim because the New York Courts have adhered to established principles of law and because the asserted policy of Nebraska does not coincide with the proposition in which they and the aggrieved Petitioner are interested.

Since these Attorney Generals are concerned over and are solicitous for the welfare of their respective local citizens, it is recommended and suggested that they expend their efforts, not in criticizing the fundamental laws of this Land, but toward adopting the Uniform Insurers Liquidation Act (9 Uniform Laws Annotated) which has been enacted into the New York Insurance Law, §§ 517-524 and which is available to all States.

The Act provides a plan or method of determining the liabilities of a delinquent insurer authorized to do business in a foreign state where both the state of incorporation and the foreign state are parties to the Act. Upon the entry of an order of liquidation, the state of incorporation establishes a domiciliary liquidation proceeding; the foreign state may set up an ancillary proceeding. With both in existence, local creditors in the foreign state with controverted claims may either prove their claims in the domiciliary or in the ancillary proceeding and if, in the

latter, the determination of the claims is binding on the domiciliary receiver. If there is no ancillary proceeding, all claims must be proved in the domiciliary proceeding (§§ 4 and 5 of the Act).

Thus, whatever the situation, all claims are required to be established in a liquidation proceeding conducted either by the superintendent of insurance in the domiciliary state or in the foreign state. No creditor is given the right to sue, and special proceedings for the collection of the amount claimed outside the liquidation proceedings are expressly prohibited (§ 9 of the Act).

To permit claimants to adopt the procedure of obtaining a judgment in the local courts, foreign or domestic, outside of the liquidation proceeding, would materially disrupt, hamper and delay the orderly liquidation of an insolvent insurer and greatly increase administration expenses. The domiciliary liquidator would either have to appear by local counsel in the local courts in every state of the Union at a prohibitive expense or suffer default judgments to be taken which, if binding on the Liquidator, would unjustifiably reduce the assets in his possession for distribution among creditors who abided by and followed the statutory regulations for the allowance of claims.

Conclusion

There is no conflict in decisions, nor has the Court below disregarded any decisions that could possibly lead to a different result. On the contrary, it is submitted that the decision of this Court in *Laughlin* v. *Pink,* 311 U. S. 707, to deny certiorari, should be followed herein. The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD F. KEENAN,
Attorney for Respondent.

J. FRANCIS LYNCH,
Of Counsel.

24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 466.

DEPARTMENT OF BANKING, STATE OF NEBRASKA as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska, *Petitioner,*

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company.

PETITION FOR REHEARING.

WALTER R. JOHNSON,
Attorney General of the State of Nebraska,
Counsel for Petitioner.

MORRIS AMCHAN,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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DEPARTMENT OF BANKING, STATE OF NEBRASKA as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska, *Petitioner,*

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company.

PETITION FOR REHEARING.

May It Please the Court:

Your petitioner, the Department of Banking, State of Nebraska, respectfully presents this petition for re-hearing and prays that the order of this Court denying the petition for certiorari for want of jurisdiction, be vacated as having been improvidently denied.

On December 21, 1942, this Court in a *per curiam* opinion, denied the petition for certiorari on the ground that it was not filed within the time provided by law.

By order of this Court, petitioner's time within which to file a petition for rehearing herein was extended to and including March 15, 1943.

A.

On June 18, 1942, the Court of Appeals of the State of New York affirmed the judgment of the Appellate Division of the Supreme Court and issued its remittitur on that day. No opinion was rendered by the Court.

On July 15, 1942, petitioner made a motion in the Court of Appeals, returnable at the first motion day after the rendition of the judgment of June 18th, for an order, "recalling the remittitur herein and upon such recall to amend it in the particulars requested in the annexed affidavit, and for such other and further relief as to the Court may seem just and proper." The particulars requested in the affidavit were (1) recalling the remittitur for the purpose of adding and indicating the consideration and decision of a federal question necessary to the case, and (2) for the purpose of amending the remittitur as to costs.

The motion was opposed by the Liquidator who submitted papers thereon. Thereafter the Court granted appellant's motion in part, by recalling the remittitur and amending it by adding thereto a statement that a federal question was presented and necessarily passed upon by the Court.

The date of the amended remittitur is July 29, 1942. The petition for certiorari was filed on October 20, 1942.

Counsel in filing the petition for certiorari computed the statutory three month period from the date of the amended remittitur. Although neither counsel suggested or raised any question as to the jurisdiction of this Court with respect to the timeliness of the petition, nevertheless, the Court, *sua sponte* and without the assistance of briefs or argument of counsel ruled that the time within which to file the petition began to run from the date of the first remittitur rather than from the date of the amended remittitur.

In this petition for rehearing, therefore, the jurisdictional point is being presented and argued for the first time.

B.

Counsel in computing the time from the date of the amended remittitur, followed and relied upon recent decisions of this Court which plainly indicate that without the amended remittitur in the record, this Court would have no jurisdiction to review the judgment of the State court. The cases relied upon by counsel seem to have required us to proceed in the manner that we did.

Lynch v. *New York*, 293 U. S. 52
Villa v. *Van Schaick*, 299 U. S. 152
International Steel Co. v. *Surety Co.*, 297 U. S. 657, 662
Honeyman v. *Hanan*, 300 U. S. 14, 25
Minn. v. *National Tea Co.*, 309 U. S. 551, 555
Bakery Drivers Local v. *Wohl*, 315 U. S. 769.

The fact that counsel for appellee did not raise any question as to jurisdiction is not without significance. In *Villa* v. *Van Schaick*, 299 U. S. 152, the appellee, who is the same public official that is the appellee in the case at bar, moved to dismiss an appeal filed in this Court on an *identical* state of facts, the point was specifically argued, and this Court rejected then the contention of the appellee. On that experience that argument was not again made by appellee and we venture to suggest this as the reason why the point of jurisdiction was not raised by counsel.

In the *Villa*, case, *supra* (and we have examined the transcript of the record and briefs filed in this Court) the facts were as follows:

February 26, 1935—date of remittitur of the Court of Appeals.

March 20, 1935—order of Court of Appeals denying reargument.

April 5, 1935—Appeal to Supreme Court filed.

October 22, 1935—Appeal dismissed for "want of a properly presented federal question." (296 U. S. 544.)

November 18, 1935—Motion by appellant in Court of Appeals to recall and amend its remittitur dated February 26th, by adding thereto consideration and desion of federal question.

November 26, 1935—Amended remittitur of the Court of Appeals adding a statement that it considered and passed upon a federal question.

The text of the amended remittitur appears in the Transcript of the Record at page 55, and is *identical* in terminology with the amended remittitur filed in the case at bar, probably because the practice of the Court of Appeals is to use a printed form.

Thereafter a new judgment was entered in the Supreme Court of the State of New York on the amended remittitur of the Court of Appeals, and computing the time from the date of entry of the new judgment, an appeal was filed again.

This judgment entered after the date of the amended remittitur of the Court of Appeals was characterized by appellant in his brief (p. 4), as, "a new judgment in conformity with the amended remittitur of the Court of Appeals and was in no respect an application for new, different or other relief than had been sought by this motion for an amendment of the remittitur in the Court of Appeals."

On this state of the record, the appellee, the Superintendent of Insurance of the State of New York, moved to dismiss the appeal, and in his brief, presented the following argument (p. 5, et seq.):

"*Statement Against Jurisdiction*"

"Appellee respectfully submits the following grounds making against the jurisdiction of this Court:

(1) *The appeal herein is untimely, as it is not taken within the time allowed by Statute for the same* (Rev. Stat. 1008; Title 28 USCA, section 350).

* * * * * * * * *

Appellee contends that the three months statutory period for taking an appeal to this Court is mandatory and jurisdictional. Consequently, the time for taking an appeal cannot be extended by waiver, consent or order of the Court.

Appellee further contends that the judgment or decree referred to in R. S. 1008, is the final order and judgment of the Court of Appeals of the State of New York, and not the order and judgment of the Supreme Court of the State of New York upon the order, judgment or remittitur of the Court of Appeals.

Appellee contends that in view of the fact that the time to appeal to this Court had expired at the time when the applications to recall and amend the remittitur of the Court of Appeals were made to, and granted by that Court, the said amendments can in no wise operate to extend the appellants time to appeal to this Court. To permit such result, would be tantamount to a nullification, circumvention and evasion of R. S. 1008. *Besides, appellee submits that the various amendments to the remittitur did not and could not affect the date, or the finality of the original order or judgment of the Court of Appeals, dated February 26, 1935.*" (Italics in original brief.)

In reply, Appellant's Brief in Opposition to Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, argued (page 6):

"(2) *The appeal herein has been taken within the time allowed by statute for the same.*

The Court of Appeals had complete power over its remittitur to amend it in whatsoever way it deemed proper in furtherance of the interests of justice. * * *

Prior to the amendment of its remittitur by the Court of Appeals there was no judgment appealable to the Supreme Court of The United States. This is established by the dismissal of the appeal from the former judgment by this Court. * * *

It certainly cannot be said that the time to appeal to this Court begins to run prior to such time as a judgment is entered which is appealable to this Court. What the appellants are really contending is that the

> Court of Appeals should not have amended its remittitur and directed the entry of a new judgment thereon."

With the point thus squarely presented to this Court, it was held that the appeal was timely filed.

The *Villa* case, it should be noted, involved a question relating to the liquidation in New York State, of an interstate insurance company. The local bar, whose practice particularly deal with such problems was well aware of the contested points of procedure and practice relating to appeals to this court from a judgment of a state court. Counsel in the case at bar particularly relied on the above decision of this court establishing the practice to be followed in such cases.

C.

Without the amended remittitur in the record reciting that a federal question was presented and necessarily passed upon by the State Court, the petition for certiorari, under decisions of this Court, would have been dismissed for want of a properly presented federal question.

Lynch v. *New York*, 293 U. S. 52.

As a direct result of the decision in that case, the practice developed in New York (and sanctioned by this Court), in cases where an appeal or petition to this Court was contemplated, to move to amend the remittitur so as to indicate that a federal question was presented and necessarily passed upon by the Court. Such an application in the State Court cannot be considered as a *pro forma* application for a correction of the record, especially so when the judgment of the State Court may rest on two grounds, one involving a federal question and the other not. This was demonstrated in the *Lynch* case, *supra*, where the appellant, acting on the suggestion of this Court (293 U. S. at p. 54) made application to the New York Court of Appeals to

amend the remittitur. The application was denied. (266 N. Y. 431.)

Where the record fails to disclose that a federal question was presented and necessarily passed upon, this Court has declined to entertain jurisdiction and has remanded the cause to the State court for amendment, and on a supplemented record containing such amendment, this Court has entertained jurisdiction in an appeal or petition for certiorari.

Honeyman v. *Hanan*, 300 U. S. 14, at p. 25
Int'l Steel Co. v. *Surety Co.*, 297 U. S. 657, at p. 662
Minn. v. *Nat'l Tea Co.*, 309 U. S. 551, 555
Whitney v. *California*, 274 U. S. 357, 360-362.

Relying on the above authority, the bar, we respectfully submit, had reason to believe that until the judgment of the State Court clearly disclosed that a federal question was presented and necessarily passed upon by the Court, there was no judgment that was appealable to this Court, and the time within which to appeal or apply for certiorari began to run from the date of the amended judgment.

Cf. *North American Cement Co.* v. *Graves*, 299 U. S. 517 (where the remittitur of the Court was dated Nov. 20, 1935; the amended remittitur, March 10, 1936; petition for appeal filed May 1, 1936; jurisdiction entertained).

Recently, in *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, this Court again indicated, that the time to appeal or apply for a writ of certiorari begins to run from the date of the amended remittitur which recites that a federal question was presented and necessarily passed upon by the Court.

In that case, the remittitur of the Court of Appeals of the State of New York was dated December 31, 1940.

On March 28, 1941, a petition for certiorari was filed.

On May 5, 1941, this Court denied the petition (313 U. S. 572), on the ground that "it does not appear from the record that the federal question presented by the petition was

necessarily decided by the Court of Appeals," citing, *Lynch* v. *New York,* and *Honeyman* v. *Hanan, supra.*

On May 21, 1941, petitioner moved in the New York Court of Appeals "for an order amending the remittitur herein by adding thereto a statement declaring that in the determination of the case, the Court necessarily decided the federal question."

On May 27, 1941, remittitur amended by adding the statement that a federal question was presented and necessarily passed upon. (285 N. Y. 843)

May 29, 1941, petition for rehearing filed in this Court.

June 2, 1941, petition for rehearing granted, order denying certiorari vacated and writ of certiorari granted. (313 U. S. 548)

In an opinion, at 315 U. S. 769, the judgment of the Court of Appeals was reversed.

Had petitioner applied to this Court for a writ of certiorari without having in the record the amended remittitur, the appellee would have invoked the rule that where a judgment of the state court rests on two grounds, one involving a federal question, and the other not, this Court is without jurisdiction unless it clearly appears that the federal question was presented and necessarily passed upon. It was vital to petitioner therefore to secure such a statement from the Court below.

When appellant moved in the Court of Appeals to recall the remittitur and amend it, the respondent submitted an affidavit in opposition stating:

> "this affidavit is submitted in opposition to the motion of the appellant to recall and to amend the remittitur of this Court dated June 18, 1942, in two respects; first, that a question under the Federal Constitution was presented and necessarily passed upon in this proceeding by this Court; and second, that the order be affirmed without costs."

When appellant in the Court of Appeals on this motion called attention among other things, to the fact that the Court below had disallowed the claim on the ground that the "judgment obtained by claimant in the State of Nebraska is not entitled to full faith and credit in New York State, nor is it binding on the Liquidator", and that this federal question was raised and pressed throughout the proceedings, the Liquidator in his opposing affidavit argued:

> "It is therefore submitted that the claimant misconstrued the effect of the law of Nebraska in transmitting the assets to New York, for at no time did the claimant question the effectiveness of the order of liquidation in terminating the corporate existence of the Company. * * *
>
> Under these circumstances, no Federal Constitutional question was presented and necessarily passed by this Court, but rather the question of whether the transfer of assets to New York by Nebraska operated to permit the bringing of actions against a dissolved corporation contrary to principles established by common law. * * *
>
> Wherefore deponent respectfully prays that the motion to recall and to amend the remittitur of this Court dated, June 18, 1942, be in all respects denied with costs."

The amended remittitur, in the light of the above, cannot be considered as a ministerial or *pro forma* judgment of the court.

A reasonable construction of the authorities above referred to compels the conclusion that this court construed its jurisdiction with respect to computing time within which an appeal or application for a writ may be made, to run from the date of the amended judgment which indicated that a federal question was considered and passed upon by the court. It would be wholly unreasonable, in our opinion, to say that jurisdiction does not lie in this case, but does lie where an appeal or application for certiorari is taken

from an amended judgment reciting that a federal question has been considered and passed upon;—where the petition or appeal had been previously dismissed for want of a properly presented federal question.

CONCLUSION.

We have indicated in our original petition that the federal question here presented is one of public importance, which is further attested by the fact that fourteen sovereign states by their Attorneys General have filed briefs *amici curiae,* urging reversal of the judgment below. The decision of the Court of Appeals, is, as we have indicated, also in conflict with applicable decisions of this Court.

We respectfully pray therefore that the order denying the petition for a writ be vacated as having been improvidently denied, and the petition for a writ of certiorari be granted.

DEPARTMENT OF BANKING, STATE OF NEBRASKA,
Petitioner,

By WALTER R. JOHNSON,
Attorney General of the State of Nebraska,
Counsel for Petitioner.

MORRIS AMCHAN,
Of Counsel.

The undersigned, Counsel for petitioner herein, does hereby certify that this petition is filed in good faith and not for the purpose of delay.

Dated: March 1943.

WALTER R. JOHNSON.

Office - Supreme Court, U. S.
MAR 25 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 466

DEPARTMENT OF BANKING, STATE OF NEBRASKA as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska,

Petitioner,

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the NATIONAL SURETY COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

EDWARD F. KEENAN,
Attorney for Respondent,
No. 160 Broadway,
New York, N. Y.

J. FRANCIS LYNCH,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., NEW YORK—BARCLAY 7-3648-3649
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BRIEF IN OPPOSITION TO PETITION FOR REHEARING

Statement

On June 18, 1942, the Court of Appeals of the State of New York entered final judgment herein and handed down its remittitur. The period of three months provided by statute, 28 U. S. C., Sec. 350, for the filing of an application for a writ of certiorari expired on September 18, 1942. Petitioner filed its application on October 20, 1942.

On July 15, 1942 petitioner, by motion, requested the Court of Appeals to amend its remittitur by adding that a federal question was presented and necessarily passed upon when rendering final judgment. In this respect the motion

was granted on July 29, 1942. Although there was still more than a month and a half in which to timely file a petition for a writ, petitioner allowed this time to expire. A filing was made just before the expiration of a three months period computed from the amendment of the remittitur.

On December 21, 1942 this Court, in a *per curiam* opinion (63 S. Ct. 233), denied the writ "for want of jurisdiction," specifying that the petitioner had failed to file in time and that the motion to amend did not toll the time for filing the application.

Subsequently, petitioner made two motions in the Court of Appeals. Petitioner requested said Court to decree that its motion to amend the remittitur constituted a reargument or a rehearing of the entire appeal. This motion was denied on January 14, 1943. Petitioner then moved to correct the amended remittitur of July 29, 1942 by having said Court itemize, in its order, the papers submitted on the motion to amend. This motion was denied on March 4, 1943.

POINT I

On this application, petitioner, representing the creditors of a closed bank in Nebraska, presents two arguments for granting a rehearing. First, petitioner states that on the original application, neither party raised the question of jurisdiction and that therefore, argument is presented herein for the first time.

Jurisdiction is the "power to entertain the suit, consider the merits and render a binding decision thereon" (*General Investment Co.* v. *New York Central Railroad Co.*, 271 U. S.

228, 230). Whether the parties raised and argued the question of jurisdiction, or whether this Court, on its own initiative, found a lack of jurisdiction is immaterial; the facts, established before the question arose, are the essential determinative factor. This Court found that petitioner failed to file in time. Nothing that petitioner could offer by way of argument could alter this fact. This Court denied the petitioner's application for want of jurisdiction; no amount of argument could confer jurisdiction.

Second, petitioner claims that under a line of cited cases, this Court has heretofore granted rehearings and taken jurisdiction of applications for writs of certiorari and appeals by writs of error, where they were originally denied or remanded because the records did not contain certifications that a federal question had been raised and necessarily passed upon.

The cases cited by petitioner are not in point because in each such case this Court originally had jurisdiction because the applications and the appeals were timely filed. In said cases the applications were dismissed and the appeals were remanded due to the omission in the records, that a federal question had not been certified. When the certifications were added to the records, this Court considered the merits of the applications and appeals. In the case at bar, petitioner's failure to file within the time provided by statute foreclosed this Court from reviewing the original application. Not only was this Court powerless to entertain jurisdiction of the application but the petitioner was equally impotent to remedy the defect.

Petitioner argues that the amendment of the remittitur was a necessary step for the proper presentation of its application (*Lynch* v. *N. Y.*, 293 U. S. 52) and to prevent its dismissal. But petitioner fails to appreciate the distinc-

tion between a jurisdictional defect which, under the statute, cannot be remedied and one where this Court, having proper jurisdiction, but due to an irregularity in the record, has remanded the same in order to have the defect cured. Illustrative of the former is the case at bar and of the latter are the cases cited by petitioner.

CONCLUSION

It is respectfully submitted that the motion herein for a rehearing of the application for a writ of certiorari should be denied in all respects, with costs.

Respectfully submitted,

EDWARD F. KEENAN,
Attorney for Respondent.

J. FRANCIS LYNCH,
Of Counsel.